

**Before the
Federal Communications Commission
Washington, D.C. 20554**

In the Matter of)	
)	
Brasfield & Gorrie, LLC)	File Number EB-05-TP-144
)	
Licensee of Stations WPQG374 and WPLY756)	NAL/Acct. No. 200632700002
)	
Birmingham, Alabama)	FRN 0008802050

FORFEITURE ORDER

Adopted: August 25, 2006

Released: August 29, 2006

By the Regional Director, South Central Region, Enforcement Bureau:

I. INTRODUCTION

1. In this *Forfeiture Order* (“*Order*”), we issue a monetary forfeiture in the amount of four thousand dollars (\$4,000) to Brasfield & Gorrie, LLC (“Brasfield & Gorrie”), licensee of Wireless Radio Service stations WPQG374 and WPLY756, for willful and repeated violations of Sections 1.903(a) and 90.425(a) of the Commission’s Rules (“Rules”).¹ The noted violations involve Brasfield & Gorrie’s failure to operate its stations in accordance with its station authorizations and failure to identify its stations’ transmissions.

II. BACKGROUND

2. On August 13, 2005, in response to a complaint of interference to public safety radio communications, an agent of the Commission’s Tampa Office of the Enforcement Bureau (“Tampa Office”) observed the interference on the complainant’s authorized radio frequency of 465.550 MHz in Daytona, Florida. The agent monitored a series of voice communications on 465.550 MHz from a mobile direction finding vehicle for over ninety minutes. The communications consisted of discussions of the operation of construction cranes. This type of communications matched the description of the interference given by the complainant. No station identification was transmitted during the time the agent monitored. Using radio direction finding techniques, the agent determined that the source of the transmissions on 465.550 MHz emanated from a construction site in downtown Orlando, Florida.

3. On August 15, 2005, the agent returned to the Orlando construction site and monitored the frequency 465.550 MHz for over thirty minutes. No station identification was transmitted during the time the agent monitored. The agent verified with direction finding techniques that the transmissions on 465.550 MHz emanated from the site. The agent contacted the complainant and positively confirmed over the phone that the interference coincided precisely with the radio transmissions observed emanating from the construction site in Orlando. The agent then interviewed the managers of Brasfield & Gorrie located at the construction site. The agent played a tape recording of the interference, and the managers stated that they recognized the voices of the individuals as members of their construction crew. The agent requested a copy of Brasfield & Gorrie’s license to operate its radio system but they were unable to provide one at that time. The managers stated that they would utilize a different radio channel.

¹ 47 C.F.R. §§ 1.903(a), 90.425(a).

4. On August 16, 2005, a representative of the company that sold and programmed the radios used by Brasfield & Gorrie at the Orlando construction site informed the agent that Brasfield & Gorrie held two nationwide licenses, WPLY756 and WPQG374. That company informed the agent that it had programmed Brasfield & Gorrie's radios on 465.550 MHz. Brasfield & Gorrie's licenses do not authorize operations on 465.550 MHz.

5. On February 27, 2006, the Tampa Office issued a *Notice of Apparent Liability for Forfeiture* ("NAL") in the amount of \$5,000 to Brasfield & Gorrie.² Brasfield & Gorrie filed a response to the NAL dated March 23, 2006.

III. DISCUSSION

6. The proposed forfeiture amount in this case was assessed in accordance with Section 503(b) of the Communications Act of 1934, as amended ("Act"),³ Section 1.80 of the Rules,⁴ and *The Commission's Forfeiture Policy Statement and Amendment of Section 1.80 of the Rules to Incorporate the Forfeiture Guidelines*.⁵ In examining Brasfield & Gorrie's response, Section 503(b) of the Act requires that the Commission take into account the nature, circumstances, extent and gravity of the violation and, with respect to the violator, the degree of culpability, any history of prior offenses, ability to pay, and other such matters as justice may require.⁶

7. Section 1.903(a) of the Rules requires that stations in the Wireless Radio Services must be used and operated only in accordance with the rules applicable to their particular service, and with a valid authorization granted by the Commission.⁷ At the time of the observed unauthorized operations in August 2005, Brasfield & Gorrie held two Wireless Radio Service licenses granted by the Commission with callsigns WPLY756 and WPQG374. These two licenses authorized Brasfield & Gorrie to operate mobile radio units in an area encompassing most of the continental United States, including Orlando, Florida. The two licenses authorized operation on four frequencies assigned to the Industrial/Business Radio Pool.⁸ On August 13 and 15, 2005, Brasfield & Gorrie operated radio transmitters on the frequency 465.550 MHz, a frequency not authorized by its licenses. The frequency 465.550 MHz is authorized for use only by licensees in the Public Safety Radio Pool.⁹ In its response, Brasfield & Gorrie requests cancellation of the forfeiture imposed for this violation. Brasfield & Gorrie states that, upon notification of the violation by the Commission agent, it immediately contacted the third party contractor who "took immediate corrective action and fully cooperated" with the agents. Brasfield & Gorrie's response, which included a statement from the third party contractor, states that the unauthorized frequency was mistakenly programmed into its radios by the third party contractor who supplies and programs its radios. The mistake resulted in the erroneous entry of one digit of the programmed frequency, namely "465.550" instead of the authorized "464.550." Brasfield & Gorrie argues that the violation was not 'willful' because it resulted from "an inadvertent programming error rather than ... committed consciously or

² *Notice of Apparent Liability for Forfeiture*, NAL/Acct. No. 200632700002 (Enf. Bur., South Central Region, Tampa Office, released February 27, 2006).

³ 47 U.S.C. § 503(b).

⁴ 47 C.F.R. § 1.80.

⁵ 12 FCC Rcd 17087 (1997), *recon. denied*, 15 FCC Rcd 303 (1999) ("*Forfeiture Policy Statement*").

⁶ 47 U.S.C. § 503(b)(2)(D).

⁷ 47 C.F.R. § 1.903(a).

⁸ *See* 47 C.F.R. § 90.35.

⁹ *See* 47 C.F.R. § 90.20.

deliberately.” It also argues the violation should not be characterized as ‘repeated’ since it took “swift corrective action (within a day of notice).”

8. We disagree. For a violation to be considered ‘willful,’ it is not the violation that needs be “committed consciously or deliberately” but rather the act itself.¹⁰ There is no dispute that Brasfield & Gorrie, through its employees, consciously and deliberately operated radio transmitting equipment at the construction site in Orlando, Florida. In so doing, its intent to use an unauthorized frequency is unnecessary to a finding of ‘willful.’ Additionally, the action by a third party contractor in installing the unauthorized frequency which resulted in the violation does not excuse the licensee from forfeiture liability.¹¹ While Brasfield & Gorrie’s prompt response to investigate and correct the violation is commendable, it is also expected. “[C]orrective action taken to come into compliance with Commission rules or policy is expected, and does not nullify or mitigate any prior forfeitures or violations.”¹² Neither does Brasfield & Gorrie’s prompt response to remedy the violation mitigate a finding of “repeated” as it is undisputed that the transmissions on the unauthorized frequency occurred multiple times on more than one day.¹³ Therefore, we find that Brasfield & Gorrie failed to comply with Section 1.903(a) of the Rules and that this violation was willful and repeated.

9. Section 90.425(a) of the Rules requires each station to identify in English or International Morse Code its assigned call sign during each transmission or exchange of transmissions, or once each 15 minutes.¹⁴ On August 13 and 15, 2005, an agent from the Tampa Office monitored Brasfield & Gorrie’s radio transmissions for more than ninety minutes and thirty minutes, respectively. The agent never heard any of Brasfield & Gorrie’s radio users identify by its assigned call signs. Therefore, Brasfield & Gorrie failed to comply with Section 90.425(a) of the Rules. In its response, Brasfield & Gorrie does not deny the violation but requests cancellation or reduction of the forfeiture for this violation because it was unaware of the requirement. It is undisputed that Brasfield & Gorrie consciously and deliberately made multiple radio transmissions on more than one day. It is also undisputed that Brasfield & Gorrie failed to identify those transmissions with its assigned call signs. The Commission has long held that unfamiliarity with the statutory or regulatory requirements does not mitigate a forfeiture.¹⁵ Therefore, this violation was willful and repeated.

¹⁰ Section 312(f)(1) of the Act, 47 U.S.C. § 312(f)(1), which applies to violations for which forfeitures are assessed under Section 503(b) of the Act, provides that “[t]he term ‘willful’, when used with reference to the commission or omission of any act, means the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this Act or any rule or regulation of the Commission authorized by this Act....” See *Southern California Broadcasting Co.*, 6 FCC Rcd 4387 (1991).

¹¹ See, e.g., *In the Matter of Acapulco Car Service, Inc.*, 19 FCC Rcd 272, 273 (Enf. Bur. 2004); *Eure Family Limited Partnership*, 17 FCC Rcd 21861, 21863-64 (2002) (finding that licensees are responsible for the acts and omissions of their employees and independent contractors).

¹² *Seawest Yacht Brokers*, 9 FCC Rcd 6099, 6099 at ¶ 7 (1994).

¹³ Section 312(f)(2) of the Act, 47 U.S.C. § 312(f)(2), which also applies to violations for which forfeitures are assessed under Section 503(b) of the Act, provides that “[t]he term ‘repeated’, when used with reference to the commission or omission of any act, means the commission or omission of such act more than once or, if such commission or omission is continuous, for more than one day.”

¹⁴ 47 C.F.R. § 90.425(a).

¹⁵ See, e.g., *Kenneth Paul Harris, Sr.*, 15 FCC Rcd 12933, 12935 ¶ 7 (Enf. Bur. 2000) (denying a mitigation claim of a broadcast licensee, stating that its ignorance of the law did not excuse the unauthorized transfer of the station); *Maxwell Broadcasting Group, Inc.*, 8 FCC Rcd 784, 784 ¶ 2 (MMB 1993) (denying a mitigation claim of a noncommercial broadcast licensee, stating that the excuse of “inadvertent[ce], due to inexperience and ignorance of the rules . . . are not reasons to mitigate a forfeiture” for violation of the advertisement restrictions).

10. After considering Brasfield and Gorrie's past history of compliance, we conclude that a reduction of the forfeiture amount from \$5,000 to \$4,000 is appropriate.¹⁶

11. We have examined Brasfield & Gorrie's response to the *NAL* pursuant to the statutory factors above, and in conjunction with the *Forfeiture Policy Statement*. We conclude that Brasfield & Gorrie willfully and repeatedly violated Sections 1.903(a) and 90.425(a) of the Rules. We find no basis for cancellation of the forfeiture, but do find that reduction of the forfeiture amount from \$5,000 to \$4,000 based on Brasfield & Gorrie's history of compliance is appropriate.

IV. ORDERING CLAUSES

12. **ACCORDINGLY, IT IS ORDERED** that, pursuant to Section 503(b) of the Act,¹⁷ and Sections 0.111, 0.311 and 1.80(f)(4) of the Commission's Rules,¹⁸ Brasfield & Gorrie, LLC **IS LIABLE FOR A MONETARY FORFEITURE** in the amount of \$4,000 for violation of Sections 1.903(a) and 90.425(a) of the Rules.¹⁹

13. Payment of the forfeiture shall be made in the manner provided for in Section 1.80 of the Rules within 30 days of the release of this *Order*. If the forfeiture is not paid within the period specified, the case may be referred to the Department of Justice for collection pursuant to Section 504(a) of the Act.²⁰ Payment of the forfeiture must be made by check or similar instrument, payable to the order of the Federal Communications Commission. The payment must include the NAL/Acct. No. and FRN No. referenced above. Payment by check or money order may be mailed to Federal Communications Commission, P.O. Box 358340, Pittsburgh, PA 15251-8340. Payment by overnight mail may be sent to Mellon Bank /LB 358340, 500 Ross Street, Room 1540670, Pittsburgh, PA 15251. Payment by wire transfer may be made to ABA Number 043000261, receiving bank Mellon Bank, and account number 911-6106. Requests for full payment under an installment plan should be sent to: Associate Managing Director, Financial Operations, 445 12th Street, S.W., Room 1A625, Washington, D.C. 20554.²¹

14. **IT IS FURTHER ORDERED** that a copy of this *Order* shall be sent by First Class Mail and Certified Mail Return Receipt Requested to Brasfield & Gorrie, LLC at its address of record.

FEDERAL COMMUNICATIONS COMMISSION

Dennis P. Carlton
Regional Director, South Central Region
Enforcement Bureau

¹⁶ See *Max Media of Montana, L.L.C.*, 18 FCC Rcd 21375, 21379 ¶ 14 (Enf. Bur. 2003); *South Central Communications Corp.*, 18 FCC Rcd 700, 703 ¶ 9 (Enf. Bur. 2003).

¹⁷ 47 U.S.C. § 503(b).

¹⁸ 47 C.F.R. §§ 0.111, 0.311, 1.80(f)(4).

¹⁹ 47 C.F.R. §§ 1.903(a), 90.425(a).

²⁰ 47 U.S.C. § 504(a).

²¹ See 47 C.F.R. § 1.1914.